Filed 2/24/09 P. v. Barnes CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. JERMAINE MONTQUE BARNES, Defendant and Appellant.	B205393 (Los Angeles County Super. Ct. No. KA078889)

APPEAL from a judgment of the Superior Court of Los Angeles County, George Genesta, Judge. Affirmed.

Anthony D. Zinnanti, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Steven D. Matthews, Shawn McGahey Webb and David Glassman, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury convicted defendant Jermaine Montque Barnes of possession of cocaine base for sale (§ 11351.5)[1] and manufacturing a controlled substance (§ 11379.6, subd. (a)). The trial court found that defendant had suffered a prior narcotics conviction (§ 11370.2, subd. (a)). The trial court imposed an eight-year sentence.

Defendant's appeal arises out of the following circumstances. After the jury was selected, defendant moved, pursuant to *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*), to relieve his deputy public defender and for appointment of new counsel. After the trial court denied the motion—a ruling defendant does not contest on this appeal—defendant asked to represent himself. (*Faretta v. California* (1975) 422 U.S. 806 (*Faretta*).) Following a lengthy colloquy with the trial court which included defendant's review and signing of a detailed four-page *Faretta* advisement, the court granted defendant's request for self-representation. Defendant now contends that the trial court should not have granted his *Faretta* motion. We are not persuaded and therefore affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND[2]

Following a preliminary hearing at which defendant was represented by counsel, the magistrate held him to answer.

---

[1] All undesignated statutory references are to the Health and Safety Code.

[2] We omit any discussion of the crimes for which defendant was convicted because those facts are not relevant to his appellate arguments.

On July 17,[3] the People filed an information in the superior court and the trial court appointed the Office of the Los Angeles County Public Defender to represent defendant. On August 1, deputy public defender Thomas H. MacBride began representing defendant. The matter was continued several times until trial commenced on Friday, September 28. That day, the jury was selected.

When proceedings began on Monday, October 2, MacBride indicated that defendant wished to bring a *Marsden* motion. An in-camera proceeding was conducted in which the following occurred.

Defendant explained that MacBride was "working against [him]" because MacBride wanted him to commit perjury. Defendant wanted to cross-examine the arresting officers himself. Defendant stated: "I can handle this whole matter. I have little or no knowledge to [*sic*] the law, but I understand my rights and I guarantee you that I will be found not guilty and we can handle this matter today."

The trial judge asked defendant whether he wanted the court to relieve MacBride and appoint another attorney, or whether he wanted to discharge MacBride so that he could represent himself. Defendant responded: "I want to fire him." The court asked MacBride to explain the situation. MacBride denied defendant's claim that he had attempted to suborn perjury.

The court explained to defendant that MacBride was a very experienced and successful defense attorney. The court stated: "I would strongly discourage you from firing Mr. MacBride and you representing yourself, because I have yet to have someone . . . successfully defend themselves in trial. [¶] Now, you may be that first person. But based upon what you've told me, . . . you haven't pointed to

---

[3] All dates refer to 2007.

anything factual that leads me to believe that you truly understand what you're facing and what you can ask and present that is relevant to the charges."

After the trial court elicited a commitment from MacBride that he would, notwithstanding defendant's complaints, "nonetheless be able to represent [defendant] vigorously and with all [his] skill set," the court denied defendant's *Marsden* motion. It found: "From this court's standpoint, it would appear that you [defendant] have not made a factual showing or legal showing that he [MacBride] is not investigating or properly representing you from a legal standpoint. [¶] Mr. MacBride has been an attorney for 30 years and he's worked under many adverse conditions many times. . . . [¶] It does not appear . . . that there is an irretrievable break down of the attorney-client relationship."

The trial court explained to defendant: "[This] means that I'm denying your right to have the court remove [trial counsel] and place another lawyer in his place to represent you. [¶] However, you always have the right to represent yourself and say, well, then, I will fire him on my own and represent myself. [¶] However, I caution you. I'm only saying that because of your previous statements [y]ou do not have the skills, the education that Mr. MacBride has. And Mr. MacBride is an experienced lawyer who I have seen firsthand in my courtroom." The trial court specifically warned defendant that were he to represent himself and choose to testify, the prosecution would likely seek to impeach him with his prior drug-related felony convictions. The court stated: "You won't have a lawyer assist you and you'll be at the mercy of the prosecutor, questioning, you." When asked how he wished to proceed, defendant responded: "I would like to change counsel." The court again explained: "When you say change counsel, there is no other counsel. It's you or Mr. MacBride. I'm not going to replace Mr. MacBride with another lawyer. You have not shown good cause for me to relieve him, to give you another lawyer. [¶] So your choice is simply stay with Mr. MacBride, which I

suggest, or you go and represent yourself in front of this jury, which I strongly discourage you [from doing], but it – it is your right."

In response to the court's questions, defendant conceded that he knew nothing about jury instructions or the elements of the charged offenses but that he was "willing to take that chance." The trial court furnished defendant with a detailed four-page document entitled "Advisement and Waiver of Right to Counsel (*Faretta* Waiver)."[4] The judge stated that after defendant had reviewed the form, he would question him. The judge explained: "We're going to go forward right now. The jury has been picked. We're going to have opening statements."

After defendant indicated he was prepared to make an opening statement, the following exchange occurred:

> "THE DEFENDANT: It's not what I want, but I don't want Mr. MacBride.
>
> "THE COURT: Well, you're not going to get another lawyer. So your choice is to stay with Mr. MacBride or represent yourself and see how well you do.
>
> "There's the form, sir. Read it, and before I let you become your lawyer –
>
> "THE DEFENDANT: Can I review it?
>
> "THE COURT: I'm going to have you review it, sir, because I'm going to protect the record. Because if you mess up through this entire trial and you don't do all the things you thought you're going to do and you don't get the outcome that you wanted, it will be clear to the Court of Appeals that you understood all of the dangers of representing yourself and you ignored them, and you wish to go forward and represent yourself. [¶] . . .

---

[4] A copy of the document signed by defendant is attached as an appendix to this opinion.

"THE COURT: . . . Have you completed the form, sir?

"THE DEFENDANT: Yes. [¶] . . .

"THE COURT: . . . [¶] In answer to the question number 5, do you know the crimes with which you are charged are general, specific intent crimes and you answered no. So you didn't even know what the mental elements required for the law to find you guilty and yet you want to represent yourself?

"THE DEFENDANT: Yes.

"THE COURT: And that is critical in regards to understanding what the People's burden is in proving you guilty. And you're admitting that you don't even have a grasp of that.

"Do you know what facts have to be proved before you can be found guilty of the charge, and you answered yes. I don't know how you can answer yes without knowing the elements of the crime, whether it's a specific or general intent.

"And yet paragraph 7, do you know what the legal defenses are to the crime in which you're charged, you answer yes – unless you're saying, I wasn't there.

"Notwithstanding everything in this document, did you read it and understand each and every paragraph that you put your initials alongside? I'm asking you a question. Did you understand each and every paragraph that have your initials?

"THE DEFENDANT: Yes, to the best of my knowledge.

"THE COURT: Well, do you have any questions about any of the paragraphs in which you filled out?

"THE DEFENDANT: Well, you stated general and specific. I did not know the meaning.

"THE COURT: Well, those are mental elements required of the People to prove you guilty of the crime.

"THE DEFENDANT: If the jury convicts me then I'm guilty.

"THE COURT: Do you have any other questions about what's in this form?

"THE DEFENDANT: I have a lot of questions about the form. But you know, I'd rather do it myself then to be represented by someone who's not going to represent me.

"THE COURT*: Do you understand the dangers of representing yourself?*

"THE DEFENDANT*: Yes.*

"THE COURT: You understand the Court of Appeals is not going to be sympathetic when they say you shouldn't have represented yourself? Do you understand that's not going to be an argument? They won't accept it, because you were told the dangers of representing yourself. You have a high school education, never tried a case before, going up against a prosecutor who is a seasoned lawyer.

"THE DEFENDANT: I understand that she's a D.A.

"THE COURT: *Having read everything in this document, do you still wish to represent yourself?*

"THE DEFENDANT: *Yes.*

"THE COURT: Do you understand there are no delays because we've already picked a jury? I'm going to call the prosecutor in and relieve your lawyer and you can represent yourself from now on. Do you understand that this is the last chance at this point?

"THE DEFENDANT: How come I'm not allowed to change counsel? How come it's either him or me?

"THE COURT: Because I found that you did not give me good cause. I already decided that issue. I felt that under the law that you

did not provide sufficient legal reason for me to fire your lawyer and have someone else replace him. And since I've made that finding, he is your lawyer.

"But if you wish to proceed without him and represent yourself, that is your decision. However ill-advised that it is, and however contrary. I believe it's not in your interest to represent yourself. That is the choice that you have.

"Now, you may consider that choice unfair, but that's the choice that you have.

"Now we are now at the crossroads of making the decision. You have read and reviewed the advisement and waiver of right to counsel. You've initialed all of the paragraphs and you have signed it.

"Do you have any further questions?

"THE DEFENDANT: No.

"THE COURT: Do you still wish to represent yourself at this time and have the court relieve Mr. MacBride from your case or do you wish Mr. MacBride, upon reflection, to stay on your case and see if you can work it out?

"THE DEFENDANT: I would like one last attempt to work it out with Mr. MacBride.

"THE COURT: And you're asking me to keep Mr. MacBride at this time on your case? We'll have the prosecutor come in. . . . [T]he jury is going to come out and we'll have opening statements and start the trial now. There won't be any delays.

"THE DEFENDANT: I'd like to proceed further with myself – with myself.

"THE COURT: You wish to proceed?

"THE DEFENDANT: Yes.

"THE COURT: Okay. And you understood everything in this advisement about the dangers of self-representation?

"THE DEFENDANT: I'm not sure.

"THE COURT: No, no. Not sure doesn't count. It has to be explicitly clear that you understand the dangers of representing yourself in terms of education, the knowledge of the law, the fact that you're going up against someone educated in the law and the court will not help you in regards to representation.

"You are your lawyer and you will have to present your case to this jury and to this court.

"We've already picked a jury so there's no time for delay and there's no continuances. There's no one whispering in your ear, telling you what you should and shouldn't do. You're on your own. Do you understand?

"Do you want to go forward by yourself? We're not going to go forward unless you say you understand it. Then we're going to do it. If you say you understand everything, we'll do it. But I need you to make a decision right now, because we've been going on for 45 minutes on this issue. All I'm getting is silence from you.

"THE DEFENDANT: I'd like to proceed forward.

"THE COURT*: You'd like to proceed forward how? Representing yourself?*

"THE DEFENDANT: *Yes.*

"THE COURT: You don't look –

"THE DEFENDANT: I got God on my side and that's what matters to me.

"THE COURT: Well, God is not testifying in here, sir. *Do you understand all the dangers I just explained to you about representing yourself and the fact that you won't have any assistance from this*

court or anyone whispering in your ear, telling you what to do and not do? Do you understand that? I need an answer from you; yes or no.

"THE DEFENDANT: *Yes.*

"THE COURT: *And do you still, with all that understanding, the dangers and the fact that you'll be representing yourself – do you wish to proceed right now, asking this court to fire your lawyer and represent yourself, as we intend to start in about ten minutes?*

"THE DEFENDANT: *Yes.*

"THE COURT: This court has significant misgivings about this person's ability to represent himself, significant misgivings in terms of his belief that he can represent himself. He doesn't inspire confidence, but that's what he wants and that's what he gets. I'm bound by the Supreme Court ruling that you have an absolute right to represent yourself, even if it's not in your best interest. [¶] Mr. MacBride, you're now relieved." (Italics added.)

Trial commenced. Defendant represented himself. The jury returned guilty verdicts on the two charged offenses.

DISCUSSION

Defendant advances three arguments in support of his contention that the trial court improperly granted his request for self-representation.

Defendant first urges that his *Faretta* request was not unequivocal. In specific, he argues that his request was equivocal because it "was clearly conditioned on the denial of the *Marsden* motion." We disagree.

"Defendant confuses an 'equivocal' request with a 'conditional' request. There is nothing equivocal in a request that counsel be removed and, if not removed, that the defendant wants to represent himself. Once the court has decided not to remove counsel, the defendant has the choice of going ahead with

existing counsel or representing himself. There is nothing improper in putting the defendant to this choice, so long as the court did not err in refusing to remove counsel. [Citations.] If, under these circumstances, the defendant elects to represent himself, he need not show that he would make the same decision if offered other counsel." (*People v. Michaels* (2002) 28 Cal.4th 486, 524.)

Here, the trial court first considered and denied defendant's *Marsden* motion, a ruling defendant does not challenge. Thereafter, the trial court inquired whether defendant wished either to continue with MacBride or to represent himself. In the course of the lengthy discussion that followed, the trial court made clear that it would not replace MacBride and that defendant had only two choices: representation by MacBride or self-representation. Defendant repeatedly chose self-representation. That during this discussion defendant sometimes expressed his wish that his *Marsden* motion had been granted does not change the conclusion that his *Faretta* request was unequivocal. At several points, the trial court patiently explained the two options and defendant nonetheless opted to represent himself. In sum, defendant's request for self-representation was unequivocal.

Defendant next urges that his waiver of the right to counsel was not knowing and intelligent. As appellant, it is defendant's burden to establish that he did not intelligently and knowingly waive the right to counsel. (*People v. Truman* (1992) 6 Cal.App.4th 1816, 1824.) In that regard, he argues that his "lack of knowledge of the legal basics of his case, his obvious difficulty with literacy, logical comprehension and final resolution that 'I got God on my side and that's what matters to me'" demonstrates "anything but lucid reflection on the dangers of self-representation." We are not persuaded.

"'When confronted with a request' for self-representation, 'a trial court must make the defendant "aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is

made with eyes open.'"" (*People v. Stanley* (2006) 39 Cal.4th 913, 932.) No particular form of words is required. (*People v. Lawley* (2002) 27 Cal.4th 102, 140.) "If the trial court's warnings communicate powerfully to the defendant the 'disadvantages of proceeding pro se,' that is all '*Faretta* requires.' [Citation.]" (*People v. Sullivan* (2007) 151 Cal.App.4th 524, 546.)

Here, in a lengthy 45-minute exchange, the trial court repeatedly advised defendant that he would be foolish to represent himself; that he would be opposed by an experienced prosecutor; and that the trial court would not provide him with assistance. In addition, the written *Faretta* waiver signed by defendant, attached as an appendix to this opinion (see fn. 4, *ante*), explained in great detail the dangers and disadvantages of self-representation. The paragraph immediately above defendant's signature reads: "I hereby certify that I have read, understood and considered all of the above warnings included in this petition, and I still want to represent myself. I freely and voluntarily give up my right to have a lawyer represent me." This record is sufficient to establish a knowing and intelligent waiver of the right to counsel. Defendant's confusion about legal issues and his belief that God was on his side does not change this conclusion. The law does not require legal knowledge or the ability to mount a valid defense before finding a defendant's waiver of the right to counsel to be knowing and intelligent. (*Faretta v. California, supra*, 422 U.S. at p. 836.)

Lastly, defendant urges that the trial court should have denied his *Faretta* request because it was untimely, being made after jury selection had been completed and immediately before presentation of the opening statements. In particular, he argues that the record "is absent of any articulation of discretion [by the trial court] considering . . . the timeliness of the motion." This argument does not pass muster.

Our Supreme Court has held that while a defendant has an absolute right to represent himself, the defendant must assert that right in a timely manner. If asserted in an untimely manner, the trial court has the discretion to grant or deny the request. *People v. Windham* (1977) 19 Cal.3d 121, 128-129 sets forth the factors the trial court can consider in exercising its discretion in ruling upon an untimely *Faretta* request.

However, the cases upon which defendant relies involved appellate review of the trial court's denial (not grant) of an untimely *Faretta* motion. (*People v. Clark* (1992) 3 Cal.4th 41, 98-101; *People v. Burton* (1989) 48 Cal.3d 843, 852-854.) Defendant has cited no case reversing the grant of an unequivocal *Faretta* request (based upon a knowing and intelligent waiver of counsel) simply because it was untimely. In fact, our Supreme Court has held to the contrary. If the trial court grants an untimely *Faretta* request, the "defendant may not be heard to argue on appeal that his own motion should not have been granted. [¶] . . . 'The *Windham* factors primarily facilitate efficient administration of justice, not protection of defendant's rights.' [Citation.] Because the [trial] court granted defendant's motion for self-representation at his own insistence, he may not now complain of any error in the court's failure to weigh the *Windham* factors. [Citations.]" (*People v. Clark, supra,* 3 Cal.4th at p. 109; accord: *People v. Bradford* (1997) 15 Cal.4th 1229, 1370-1371.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.